79-840

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979
NO.

WICKHAM CONTRACTING CO., INC. and INSURANCE COMPANY OF NORTH AMERICA,

Petitioners,

-against-

ROBERT J. HARDER, INC., LEJAC METAL SPECIALTIES, INC., H. KLEIN & SONS, INC., CARDA WINDOW CORPORATION, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent Carda Window Corporation (hereinafter "Carda") submits this brief in opposition to the petition of Wickham Contracting Co., Inc. (here-

inafter "Wickham") for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

The petition for certiorari filed by Wickham seeks review of the order of the United States Court of Appeals for the Second Circuit filed on June 25, 1979 in two separate cases -- an interpleader action (Appeal No. 79-7235), and a Miller Act action (Appeal No. 79-7236). The petition, however, bears only the caption of the interpleader action and fails to distinguish the Miller Act action, in which Carda is named as use-plaintiff.

This distinction is important, for the Miller Act action involves only a dispute between Wickham, as general contractor, and Carda, as subcontractor. The government is not a party and no federal questions warranting review by this Court are involved.*

* In making this distinction we do not wish to imply that certiorari is warranted in the interpleader action. Indeed, the reasons advanced by us for denying the petition (infra at 11) may very well apply to the interpleader action.

Opinions Below

The decision of the Court of Appeals (Wickham's petition, App. A) is not yet reported. The decision of the District Court on the Miller Act action (Petition, App. B) is unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 25, 1979, and a petition for rehearing en banc was denied on August 10, 1979. On November 14, 1979 Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including November 29, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

With regard to the Miller Act action, the questions presented to this Court are not those as posed by Wickham at page 2 of its petition. Rather, we submit that the only question before this Court, and the only question which was before the Court of Appeals, is whether the District Court abused its

discretion in denying petitioner's motion for relief under Rule 60(b) of the Federal Rules of Civil Procedure (Sampson v. Radio Corporation of America, 434 F.2d 315, 317 (2d Cir. 1970)).

The question asserted by Wickham, relating to a stay of Carda's Miller Act suit, was neither before the Court of Appeals nor the District Court. The sole request made by Wickham for a stay in the District Court was limited to claims for additional or extra work and for damages for delay or interference by subcontractors (other than Carda) named as party defendants in the interpleader action. Carda, in its Miller Act action, sought only its contract balance -- which had been paid to Wickham. And, it was only upon this claim that Carda moved for summary judgment before the District Court.

The "important question of federal law" (Petition at 9) and the "conflict of Court of Appeals decisions" (Petition at 12) simply do not exist in either the interpleader or Miller Act action. The Court of

Appeals ruled solely on the narrow ground that the District Court did not abuse its discretion in refusing to disturb judgments granted to Carda and certain other of Wickham's subcontractors.

Statute Involved

The Miller Act, 40 U.S.C. 270a-270b, is produced by Wickham at pages 2-3 of its petition.

Statement of the Case

Carda's action under the Miller Act was instituted in May 1977 to recover the contract balance due under its subcontract with Wickham for the installation of aluminum windows in Samuels Hall, a facility at the United States Merchant Marine Academy. Wickham was the general contractor for the alterations and rehabilitation of the facility.

Several months earlier, in September 1976, Wickham had received a progress payment representing the balance due for 95% of Carda's work. This payment was illegally diverted by Wickham for use in connection with another of its projects.

In March 1978, Carda moved for summary judgment relying upon the undisputed facts that, as of August 1976, Carda had substantially completed its contract; that Wickham had received payment for the work completed by Carda; and that Wickham had breached its contract with Carda by failing to make the progress payment then due.

In opposition to Carda's motion, Wickham asserted that Carda's work was incomplete and that Carda had delayed Wickham's overall performance by failing to make timely window sample submissions. (Shortly before Carda moved for summary judgment, the Department of Commerce, with whom Wickham had contracted for the alterations to Samuels Hall, terminated Wickham's contract and issued a reprocurement contract to another contractor to complete the work remaining open under Wickham's contract. In further opposition to Carda's motion, Wickham asserted that numerous items on the reprocurement contract were attributable to Carda's work. However,

from an examination of the "punch list," which formed the basis of the reprocurement contract, it became apparent that the work attributable to the installation of windows was of a minor nature and involved only patching and painting.)

In granting the motion, the District Court found that Carda had completed its work and that Wickham failed to support its claims that Carda was responsible for significant portions of the reprocurement contract or for the liquidated damages which the government asserted against Wickham, stating:

> "[I]n December 1976, Wickham certified to the United States that the aluminum window work even then was 95% complete. At a status conference in open court, the representative of the Department of Commerce stated that Carda's work had been fully accepted by the government. No facts have been presented to suggest that Carda's work was not completed. Slip op. at 14-15."

Accordingly, the District Court granted Carda's motion for summary judgment against both Wickham,

and its surety, INA, but without prejudice to the issues asserted by Wickham in its counterclaims. The Court made provision to secure those counterclaims by requiring Carda to file a bond or a cash deposit in the amount of $8,000 as a condition precedent to the entry of judgment. This deposit was made and judgment was entered on November 21, 1978 in the sum of $50,326.45.

Both Wickham and INA filed notices of appeal; Wickham, however, failed to docket its appeal and the Court of Appeals dismissed same. While INA did docket its appeal, the appeal was withdrawn, subject to reinstatement within thirty days. Subsequent to the dismissal of its appeal, Wickham applied for reinstatement; the application was denied. INA failed timely to reinstate its appeal.

By order to show cause dated January 31, 1979, Wickham moved for various forms of relief in the Carda action, the interpleader action, and other related Miller Act actions. With respect to the Carda

action, Wickham sought renewal and rehearing of the motion for summary judgment on the grounds that, inter alia, the contracting officer of the Department of Commerce issued a decision "containing facts which, if known to deponent [Wickham's project manager] prior to this, would have substantially changed the pleadings in this action submitted by defendant Wickham Contracting Co., Inc. and would have changed the facts presented by the defendant Wickham Contracting Co., Inc. in its affidavits in opposition to the motions for summary judgment made by ... Use-Plaintiff Carda Window Corporation."

However, further examination of Wickham's moving affidavit and the decision of the contracting officer relied upon by Wickham (with respect to Carda), revealed that no new facts were presented in support of the relief sought. Wickham's counterclaim (first asserted in its answer in July 1977) sought damages from Carda for "Punch list work" (see ¶11, answer of Wickham, 77 Civ. 1012). This contention

was repeated in opposition to Carda's motion for summary judgment, and was allegedly supported by an "architectural list" used by the government in reletting the work for Samuels Hall -- the same list referred to on Wickham's motion for rehearing.

Additionally, Wickham, in opposition to Carda's motion for summary judgment, claimed that Carda was responsible for delays in performance. Anthony J. Biele, Wickham's president, stated that a portion of the liquidated damages then being asserted against Wickham by the government "may be attributable to Carda's work" and that "the government is contending that Carda delayed the project by failing to timely make its window submittals. (See Biele affid., July 29, 1978 at p. 3)." Again, this was the same claim raised in support of its motion to rehear.

Thus, nothing new was offered to the District Court to support Wickham's request for Rule 60(b) relief. As held by that Court:

> "Wickham again merely relies on the contracting officer's decision

> attributing certain delays in the work Carda performed. No new facts are revealed that could not have been disclosed at the time of Carda's initial motion for summary judgment. Accordingly, the Court's decision shall stand, and Wickham's motion with respect to Carda is denied." (Petition at 8a)

The Court of Appeals affirmed, holding that

> "[T]he narrow issue before us is whether Judge Pratt abused his discretion in refusing to reopen the judgment under Rule 60b. We find that this was not an abuse of discretion for the reasons given in Judge Pratt's opinion dated March 16, 1979." (Petition at 3a)

We submit that, despite Wickham's effort to enlarge the issue before this Court, the issue remains a narrow one as defined by the Court of Appeals. Thus, no basis exists for the issuance of a writ of certiorari as requested by Wickham.

Reasons for Denying the Petition

Contrary to Wickham's assertion, there are no important questions of federal law involved in either

the interpleader or Miller Act action. No stay was sought in the Miller Act action and there is no issue involving the determination of disputes in "two possible forums" (Petition at 9). Indeed, had a stay been sought, it would have been denied.

It is well settled that a subcontractor's exclusive remedy to recover its contract balance is a suit under the Miller Act. H.W. Caldwell & Son, Inc. v. United States for Use and Benefit of John H. Moon & Sons, Inc., 407 F.2d 21 (5th Cir. 1969); Beacon Construction Co. of Massachusetts v. Prepakt Concrete Co., 375 F.2d 977 (1st Cir. 1967); United States for Use and Benefit of B's Co. v. Cleveland Electric Co. of South Carolina, 373 F.2d 585 (4th Cir. 1967). See also, United States for Use and Benefit of T/N Plumbing & Heating Co. v. Fryd Construction Corp., 423 F.2d 980 (5th Cir. 1970); Warrior Constructors, Inc. v. Harders, Inc., 387 F.2d 727 (5th Cir. 1967); Fanderlik-Locke Co. v. United States for Use of M.B.

Morgan, 285 F.2d 939 (10th Cir. 1960), cert. denied, 365 U.S. 860 (1961); Fett Roofing & Sheet Metal Co., Inc. v. Seaboard Surety Co., 294 F.Supp. 112 (E.D. Va. 1968). In Warrior Constructors, Inc. v. Harders, Inc., supra, 387 F.2d at 729, the court stated:

> "The remedy for a subcontractor seeking to recover for labor and materials furnished on a government contract is under the Miller Act, and it has been held that when a prime contractor has a claim for the same amounts pending under the 'disputes clause' of the prime contract, a subcontractor's claim under the Miller Act is not affected."

Nevertheless, Wickham offers a transparent argument that the present dispute is one between the government and Carda (Petition at 10). Such is not the case -- the dispute is one in which Carda only sought to recover the balance of its contract. As stated supra, Wickham inspected and subsequently certified that Carda's work was 95% completed, for which Wickham received payment from the government. Instead of paying Carda, and in contravention

of its contract with Carda, Wickham illegally diverted the government monies to another project on which it was working.

Had the government failed to pay Wickham for Carda's work, then the appropriate remedy may have been an administrative one. However, the dispute that arose between Wickham and Carda is one in which the government is not involved and the so-called "disputes clause" relied upon by Wickham has no application. See Fanderlik-Locke Co. v. United States for Use of M.B. Morgan, supra, 285 F.2d at 941; Beacon Construction Co. of Massachusetts v. Prepakt Concrete Co., supra, 375 F.2d at 979; H.W. Caldwell & Son, Inc. v. United States for Use and Benefit of John H. Moon & Sons, Inc., supra, 407 F.2d at 23-24.

The only possible limitation upon Carda's right to sue under the Miller Act is contained in Articles 23 and 25 of the subcontract, and these articles do not relate to Carda's right to recover its contract balance. The plain reading of Article 23 (Petition, Appendix D

at 12a) compels the conclusion that only where the subcontractor makes a claim for (1) additional or extra work, or (2) damages for delay or interference due to actions of the government, must it refrain from instituting legal action until there has been a final adjudication in administrative proceedings. Article 23 does not relate to a subcontractor's claim for its contract balance.

Similarly, Article 25 relates only to "a dispute, question or claim arising out of an order, or acts of the government" -- not a claim for monies due and owing the subcontractor (and which have been paid to and were illegally diverted by the contractor).

Nor does either Article 23 or 25 relate to the prosecution and defense of claims against the subcontractor, as contended by Wickham (Petition at 12). These articles provide no basis for a stay of a Miller Act suit instituted by the subcontractor to recover contract balances.

* * *

Likewise, there are no conflicting Courts of Appeals decisions in this regard, as contended by Wickham (Petition at 12-13).

The only case offered by Wickham in support of its contention is not applicable to the instant action and does not conflict with other authorities. In United States of America and/or Metropolitan Area Transit Authority v. Maryland Casualty Co., Civ. Action 75-1676 (4th Cir. 1975), aff'd, 530 F.2d 971 (4th Cir. 1975), the parties had agreed that the Miller Act was not applicable and that the disputes clause did, in fact, govern the issues being litigated. The Fourth Circuit noted that the conclusion of the administrative proceedings "may eventually moot the entire Civil action."

Such a result is not possible at bar; Carda's claim is not before the Department of Commerce, and even Wickham does not contend that the administrative proceedings will in any manner affect the determination by the District Court that Carda is entitled

to judgment for its contract balance. Further, the District Court in Maryland Casualty was asked to stay the entire proceedings, whereas, in the instant case, Wickham requested a stay of proceedings only,

> "with respect to the claims asserted by [the subcontractor] for additional and extra work and/or for damages for delay and interferences or for any cause that may be or which defendant Wickham Contracting Co., Inc. asserts is attributable to or arises out of the action, complaints, neglects, default or orders of the Government pursuant to Articles 23 and 25 of the subcontract between Wickham Contracting Co., Inc. and its subcontractors."

Maryland Casualty is thus not in conflict with either the decision herein or the decisions cited at page 13 of Wickham's petition. No basis exists for the issuance of a writ of certiorari.

Conclusion

For all the foregoing reasons, Wickham's petition for a writ of certiorari should be denied.

Dated: New York, New York
December 27, 1979

Respectfully submitted,

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